



[Billing Code: 6750-01S]

## **FEDERAL TRADE COMMISSION**

### **16 CFR Part 433**

**[RIN 3084-AB16]**

## **Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses**

**AGENCY:** Federal Trade Commission.

**ACTION:** Confirmation of rule.

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**SUMMARY:** The Federal Trade Commission (“FTC” or “Commission”) has completed its regulatory review of the Trade Regulation Rule Concerning Preservation of Consumers’ Claims and Defenses (“Holder Rule” or “Rule”) as part of the agency’s regular review of all its regulations and guides, and has determined to retain the Rule in its present form.

**DATES:** This action is effective [insert date of publication in the Federal Register] and is applicable as of April 23, 2019.

**ADDRESSES:** Relevant portions of the record of this proceeding, including this document, are available at <https://www.ftc.gov>.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Rosenthal, (202) 326-3332, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave. NW, Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:**

## **Introduction**

The Federal Trade Commission previously requested comments on the Holder Rule as part of its comprehensive regulatory review program.<sup>1</sup> Specifically, the Commission sought comments on the Holder Rule's costs and benefits, and on whether there is a continuing need for it. Commenters uniformly supported the Rule, and a few suggested restating a previously announced advisory opinion of the Rule, clarifying portions of the Rule, or expanding the reach of the Rule. After considering the comments and evidence, the Commission has determined to retain the Rule without modification.

## **Background**

On November 14, 1975, the Commission promulgated its Trade Regulation Rule Concerning the Preservation of Consumers' Claims and Defenses. The Holder Rule protects consumers who enter into credit contracts with a seller of goods or services by preserving their right to assert claims and defenses against any holder of the contract, even if the seller subsequently assigns the contract or works with a third-party creditor who finances the sale. It requires sellers that arrange for or offer credit to finance consumers' purchases to include the following Notice in at least ten-point, bold face type in their contracts: "ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED . . . WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR

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<sup>1</sup> The Commission publishes this schedule annually, with adjustments in response to public input, changes in the marketplace, and resource demands. For more information, see <https://www.ftc.gov/enforcement/rules/retrospective-review-ftc-rules-guides>.

SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.”<sup>2</sup> A creditor or assignee of the contract is thus subject to any claims or defenses that the consumer could assert against the seller. The Commission adopted the Rule to provide recourse to consumers who otherwise would be legally obligated to make full payment to a creditor or assignee despite breach of warranty, misrepresentation, or even fraud on the part of the seller.<sup>3</sup>

### **Regulatory Review Comments and Analysis**

The Commission received nineteen comments in response to its *Federal Register* notice.<sup>4</sup> Three comments were from consumer groups and legal advocacy organizations, three comments were from offices of State Attorneys General, five comments were from industry and trade association groups, four comments were from credit unions and a credit union association, and four comments were from consumers. As discussed below, all commenters who addressed the issue agreed that the Commission should retain the Rule, although some suggested modifying or clarifying the Rule.

The Commission discusses the comments in three sections. In Section A, the Commission discusses the comments that support retaining the Rule. Section B discusses the comments concerning affirmative recoveries and the Commission’s 2012 advisory opinion on that topic. In Section C, the Commission analyzes the comments that propose

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<sup>2</sup> 16 CFR 433.2. The Rule does not apply to financing by credit card issuers. 16 CFR 433.1(c).

<sup>3</sup> See 40 FR 53506, 53507 (Nov. 18, 1975) (“The rule is directed at what the Commission believes to be an anomaly. . . . The creditor may assert his right to be paid by the consumer despite misrepresentation, breach of warranty or contract, or even fraud on the part of the seller, and despite the fact that the consumer’s debt was generated by the sale.”)

<sup>4</sup> A table at the end of this notice lists the organizations that commented. All nineteen comments are available on the Commission’s website at <https://www.ftc.gov/policy/public-comments/initiative-631>.

modifications to the Rule.<sup>5</sup> The Commission has analyzed the proposed benefits to consumers of proposed changes to the Rule's coverage, including any evidence provided of those benefits, and balanced those proposed benefits against the cost of implementing the changes, the need for the change, and alternative means of providing these benefits for consumers, such as consumer education materials.

**A. *Support for the Rule***

All of the commenters who addressed the issue supported maintaining the Rule; none advocated rescinding it. For example, a comment on behalf of consumer groups stated, "The Holder Rule is one of the most important actions the Commission has ever taken in preventing and remedying unfair and deceptive practices in the marketplace."<sup>6</sup> This comment also noted, "The Holder Rule has resulted in no cost to consumers and only minimal cost to businesses."<sup>7</sup> Another comment stated that "[c]onsumer advocates have described the Holder Rule as the 'FTC's most effective tool against fraud.'"<sup>8</sup> NACA stated that the Rule "protects consumers in the marketplace from unscrupulous vendors by providing a valuable avenue for redress when sellers act badly."<sup>9</sup> The Iowa

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<sup>5</sup> A few comments urged clarifications of the Rule or discussed interpretative staff guidance. For example, several comments urged the Commission to confirm or reject 1976 staff guidelines regarding exempt transactions. Bingham (opposing \$25,000 exemption "made in 1976"); NCLC at 6 (commenting that Commission should clarify the Rule's application to large transactions because 1976 staff statement describing such an exemption was misconceived); AFSA at 3, 5 (urging the Commission to confirm 1976 staff guidelines and arguing that transactions that exceed \$50,000 are exempt). The Commission has not formally reviewed or adopted the staff views discussed in these comments. *See* 41 FR 20022 (1976). Staff will review the 1976 informal guidelines and educational materials in light of these comments. Because these comments do not advocate or provide evidence for modification or rescission of the Rule, they are beyond the scope of this review. *See* 80 FR 75019 (describing the Commission's Regulatory Review Program).

<sup>6</sup> National Consumer Law Center ("NCLC").

<sup>7</sup> *Id.*

<sup>8</sup> National Association of Consumer Advocates ("NACA").

<sup>9</sup> *Id.*

Attorney General’s office described how the Rule has benefitted consumers in Iowa, and encouraged the Commission to retain the Rule.<sup>10</sup> Industry members and credit unions also supported maintaining the Rule. The American Financial Services Association (“AFSA”) and National Independent Automobile Dealers Association (“NIADA”) urged the Commission not to make any changes to the Rule.<sup>11</sup> The National Auto Dealer Association (“NADA”) similarly supported retention of the Rule as is, citing wide industry compliance with the Rule in its current form.<sup>12</sup> The Heartland Credit Union Association (“Heartland”) supported the consumer protection goals of the Rule and “supports compliance with the Holder Rule.”<sup>13</sup>

In light of the comments received, and in the absence of any opposition, the Commission concludes that a continuing need exists for the Rule. The comments indicate that the Rule benefits consumers and does not impose significant costs, and the Commission has no evidence to the contrary. Accordingly, the Commission has decided to retain the Rule.

***B. Reiteration of the Commission’s 2012 Advisory Opinion Regarding Affirmative Recoveries***

Two commenters asked the Commission to reiterate the Commission’s May 3, 2012 advisory opinion concerning affirmative recoveries.<sup>14</sup> The Commission restates

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<sup>10</sup> Iowa Attorney General’s office; *see also* Nadine Brown.

<sup>11</sup> AFSA, NIADA.

<sup>12</sup> NADA.

<sup>13</sup> Heartland. *See also* Illinois Credit Union League (noting that not a large number of their members’ transactions are affected by the Rule).

<sup>14</sup> NACA and NCLC.

that opinion as part of this rule review.<sup>15</sup> In particular, the Rule does not limit affirmative recovery to circumstances where rescission is warranted or where the goods or services sold to the consumer are worthless. Indeed, the Rule places no limits on a consumer's right to an affirmative recovery other than limiting recovery to a refund of monies paid under the contract. As the Commission previously stated, to give full effect to the Commission's original intent to shift seller misconduct costs away from consumers, consumers must have the right to recover funds already paid under the contract if such recovery is necessary to fully compensate the consumer for the misconduct—even if rescission of the transaction is not warranted.

One commenter further urged the Commission to affirm that the ability of consumers to bring an affirmative claim based on the Holder Rule does not depend upon whether state law authorizes affirmative actions against holders.<sup>16</sup> The commenter was specifically concerned with the Eighth Circuit's decision in *LaBarre v. Credit Acceptance Corp.*, in which the court concluded that a Minnesota consumer could not rely on the Holder Rule Notice to bring an action against an assignee because a state consumer protection statute that provided similar protections specified that consumers may raise the statutory protections only as a defense or set-off.<sup>17</sup> Although the Minnesota statute stated

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<sup>15</sup> Letter to Jonathan Sheldon and Carolyn Carter, NCLC (May 3, 2012), available at <https://www.ftc.gov/policy/advisory-opinions/16-cfr-part-433-federal-trade-commission-trade-regulation-rule-concerning>.

<sup>16</sup> NCLC.

<sup>17</sup> 174 F.3d 640, 644 (8th Cir. 1999) (citing Minn. Stat. sec. 325G.16, sub. 3). The Minnesota statute provides:

**Claims and defenses.** Any assignee of the contract or obligation relating to the consumer credit sale shall be subject to all claims and defenses of the consumer against the seller arising from the sale, notwithstanding any agreement to the contrary. Provided, however, that the assignee's liability under this subdivision shall not exceed the amount owing to the assignee at the time the

that this restriction on the manner in which consumers could assert rights applied to “the rights of the consumer under this subdivision,” the Eighth Circuit applied this restriction to a claim based on the Holder Rule Notice in the consumer’s contract. In our judgment, the court erred by limiting recovery under the Holder Rule to defense or set-off under the Minnesota statute. The Minnesota statutory limitation might apply to claims and defenses asserted under the specific subdivision of the Minnesota Code, but would not apply to other claims and defenses that a consumer might assert against the seller.<sup>18</sup>

### ***C. Proposed Modifications of the Rule***

Several commenters supported the Rule and additionally suggested modifications to the Rule. As discussed in detail below, none of the comments that proposed changing the Rule provided the Commission with specific evidence of the potential costs and benefits of such modifications.

#### **1. Comments Regarding Contractual Language and Other Notices to and Communications with Consumers**

Several commenters suggested modifying the contractual language notifying consumers of their rights under the Rule and requiring additional notices to consumers.

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claim or defense is asserted against the assignee. The rights of the consumer under this subdivision can only be asserted as a matter of defense to or set off against a claim by the assignee.

Minn. Stat. sec. 325G.16, sub. 3. A “Consumer credit sale” is defined as a sale of goods or services in which:

- (a) credit is granted by a seller who regularly engages as a seller in credit transactions of the same kind;
- (b) the buyer is a natural person; and
- (c) the goods or services are purchased primarily for a personal, family or household purpose, and not for commercial, agricultural, or business purpose.

*Id.* sec. 325G.15, sub. 2.

<sup>18</sup> See *Eachen v. Scott Housing Systems, Inc.*, 630 F. Supp. 162, 165-67 (M.D. Ala. 1986) (Holder Rule and state statute that provides that consumer rights can only be asserted as defense or set off are not in conflict because consumers premised their suit on Holder Rule, and state limitation is applicable only to consumer claims under that section of state law).

The Office of the New York Attorney General, joined by the Attorneys General of Idaho, Iowa, Kentucky, Louisiana, Maine, Maryland, Minnesota, Virginia, and Washington (“Joint Attorneys General”) recommended amending the Rule to use “less ‘legalistic’ language,” to “explicitly state that the consumer’s right to an affirmative recovery is unqualified,” and to require that collection notices include a notice advising consumers of their rights under the Rule.<sup>19</sup> The Office of the District of Columbia Attorney General (“DC AG”) also recommended modifying the “legalistic” wording of the Rule and requiring the Rule’s notice in collection notices.<sup>20</sup> Other commenters recommended modifying the Rule to require lenders to notify consumers of their rights under the Rule and “proactively and meaningfully respond to consumer complaints.”<sup>21</sup>

None of the comments proposing these modifications to the Rule provided the Commission with evidence showing how and the extent to which these changes would benefit consumers, and they did not address whether the benefits to consumers would outweigh the potential increased costs in adopting such changes. Industry commenters noted that businesses would pass any increased costs of compliance with the Holder Rule along to consumers.<sup>22</sup>

The Commission believes that the record does not support modification of the Rule language. To assist with consumers’ understanding of the Rule, however, the Commission will review and consider revising its existing consumer education materials to help inform consumers of the Rule’s protections.

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<sup>19</sup> Joint Attorneys General.

<sup>20</sup> DC AG.

<sup>21</sup> See MFY Legal Services (“MFY”).

<sup>22</sup> See AFSA; Mortgage Bankers Association (“MBA”).



## 2. Comments Regarding Application to Leases

Three comments discussed the Rule’s application to leases. Two comments advocated for the Rule’s application to leases, and one of these commenters proposed a rulemaking to extend the Rule to consumer motor vehicle leases.<sup>23</sup> A third comment urged the Commission to confirm that the Rule applies only to consumer credit contracts.<sup>24</sup> NCLC noted that courts generally have found that the Rule does not apply to leases. NCLC further asserted that leases today (in contrast to 1976) are widespread, and the Rule’s protections are just as essential for leasing as consumer credit. This comment also indicated that, under state law, lessees typically can bring seller-related defenses but cannot assert claims against the assignee. AFSA, however, stated that the “plain language of the Rule does not apply to consumer vehicle leases” and urged the Commission not to amend or expand the Rule’s application to leases.<sup>25</sup>

The Commission appreciates the information provided by these comments and notes that the Rule does apply to certain leases. Certain contracts labelled as “leases” are credit transactions in which a consumer repays debt by paying the lease installments. Such contracts, when used in the sale or lease of goods or services, are subject to the Rule.<sup>26</sup> None of the comments that advocated expanding coverage to all leases provided

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<sup>23</sup> See NCLC, Bingham.

<sup>24</sup> AFSA.

<sup>25</sup> AFSA.

<sup>26</sup> The Rule applies when a seller, “[i]n connection with any sale or lease of goods to consumers” takes or receives “a consumer credit contract” or accepts proceeds from “a consumer credit contract” made in connection with a purchase money loan. 16 CFR 433.2; *see also* 16 CFR 433.1(j) (“Seller” subject to the Holder Rule means a person who ordinarily “sells or leases” goods or services). Some leases satisfy the Rule’s definition of “consumer credit contract,” which encompasses “[a]ny instrument which evidences or embodies a debt arising from” the transactions defined in the Rule as a “Purchase money loan” and “Financing a sale.” 16 CFR 433.1(i). “Financing a sale” is defined as extending credit in connection with a “Credit sale” within the meaning of TILA and Regulation Z. 16 CFR 433.1(e). Under the TILA and

evidence as to how such a change would benefit consumers.<sup>27</sup> Furthermore, none of the comments addressed the increased costs to businesses, if any, that would result from modifying the Rule to cover all leases. Thus, the Commission does not propose changing the Rule.<sup>28</sup>

### 3. Comments Regarding Recovery of Attorney's Fees

Six comments addressed whether the Rule's limitation on recovery to "amounts paid by the debtor" allows or should allow consumers to recover attorneys' fees above that cap: four comments supported having no cap on recovery of attorneys' fees, while one opposed it and one proposed a set fee schedule in some circumstances.<sup>29</sup> According to the comments, some courts have permitted fees above the cap, while others have not. NCLC argued that liability for attorneys' fees under fee-shifting statutes is independent

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Regulation Z, a "credit sale" includes a contract in the form of a "bailment or lease" if the contract is not terminable at will by the consumer, and the consumer both contracts "to pay as compensation for use a sum substantially equivalent to, or in excess of, the total value of the property and service involved," and will become (or has the option to become), for no additional consideration or for nominal consideration, the owner of the property upon compliance with the agreement. 15 U.S.C. 1602(h); 12 CFR 226.2(a)(16); 12 CFR 1026.2(a)(16). Leases that satisfy these conditions are covered by the Holder Rule; leases that do not are not "consumer credit contracts" and are not subject to the Rule.

<sup>27</sup> During an FTC-hosted roundtable on automobile leases in November 2011, one panelist discussed the Holder Rule, stating that it was not clear whether the Rule applied to leasing. None of the panelists specifically advocated for modifying the Rule to include all leases. *See The Road Ahead: Selling, Financing & Leasing Motor Vehicles, A Roundtable* (November 17, 2011), [https://www.ftc.gov/sites/default/files/documents/public\\_events/road-ahead-3rd-roundtable-november-17th/dc\\_sess1.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/road-ahead-3rd-roundtable-november-17th/dc_sess1.pdf); [https://www.ftc.gov/sites/default/files/documents/public\\_events/road-ahead-3rd-roundtable-november-17th/dc-agenda-final.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/road-ahead-3rd-roundtable-november-17th/dc-agenda-final.pdf).

<sup>28</sup> NACA also suggested that the FTC consider eliminating the real estate mortgage exclusion from the Holder Rule so that it would apply to such transactions. This suggestion was offered without a discussion of the benefits to consumers or cost to business from the proposed change and, therefore, the Commission does not have sufficient information to consider such a modification. Wells Fargo commented that it would be inappropriate to extend the Rule to home mortgages and "strongly urge[d] the FTC to carefully study the potential impacts of any expansion, and to engage with participants in all aspects of the residential mortgage market."

<sup>29</sup> *See* 16 CFR 433.2(a) and (b). For comments supporting no cap on attorneys' fees recovery, *see* NCLC, NACA, Anderson, and MFY. For comments opposing having no cap on attorneys' fees recovery or otherwise limiting the scope of attorneys' fees in some situations, *see* AFSA, CU Direct Corporation ("CU Direct"). Some commenters recommended full elimination of the liability cap. *See, e.g.,* MFY.

from an assignee's derivative liability under the Holder Rule, and therefore is not capped by the Rule's limitation to "recovery hereunder." NCLC further argued that the purpose of fee-shifting statutes is to encourage settlement and make it feasible for consumers to pursue cases through small claims actions – which NCLC asserted would be ineffective if attorneys' fee recoveries were limited by the Rule to amounts paid by the debtor. This comment noted that the Staff Guidelines indicate that the holder is liable both for seller misconduct under the Holder Rule and for its own conduct independent of any cap:

“The words ‘recovery hereunder’ . . . refer specifically to a recovery under the Notice. If a larger affirmative recovery is available against a creditor as a matter of state law, the consumer would retain this right.”<sup>30</sup>

AFSA, however, argued that the plain language of the Rule limits all recovery, including interests, costs, and attorneys' fees, to the amount that the consumer has paid under the contract.<sup>31</sup>

We conclude that if a federal or state law separately provides for recovery of attorneys' fees independent of claims or defenses arising from the seller's misconduct, nothing in the Rule limits such recovery. Conversely, if the holder's liability for fees is based on claims against the seller that are preserved by the Holder Rule Notice, the payment that the consumer may recover from the holder—including any recovery based on attorneys' fees—cannot exceed the amount the consumer paid under the contract.

Claims against the seller for attorneys' fees or other recovery may also provide a basis for set off against the holder that reduces or eliminates the consumer's obligation. The

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<sup>30</sup> See NCLC (quoting Staff Guidelines, 41 FR at 20023); *see also* NACA. The Staff Guidelines also state that the Rule does not eliminate any other rights the consumer may have as a matter of local, state, or federal law. 41 FR at 20023.

<sup>31</sup> AFSA.

Commission does not believe that the record supports modifying the Rule to authorize recovery of attorneys' fees from the holder, based on the seller's conduct, if that recovery exceeds the amount paid by the consumer.<sup>32</sup> Additionally, one commenter suggested that the Commission use the Rule to establish a schedule of attorneys' fees and circumstances under which the fees could be awarded.<sup>33</sup> Such measures, however, are beyond the scope of the Rule, and not supported by any showing that such an expansion of the Rule is necessary to achieve its objectives.

#### 4. Comments Regarding Application of Rule in Absence of Written Notice

Some commenters asked the Commission to modify the Rule language so that Holder Rule protections would apply even where the consumer credit contract does not include the Holder Rule Notice.<sup>34</sup> According to the comments, if the contract does not contain the Holder Notice, consumers may not be able to preserve claims and defenses in all the circumstances contemplated by the Rule.

This issue would arise only in those instances where sellers make contracts or accept the proceeds from purchase money loans that omit a required Holder Rule Notice.

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<sup>32</sup> Relatedly, AFSA argued that the language of the Holder Rule stating that recovery shall not exceed amounts paid by the debtor "prevents using the Rule to impose an injunction on Holders." In support of this contention, AFSA cited precedents that discuss the distinction between a legal cause of action and the remedies (such as an injunction) that may be available for a cause of action. Neither the precedents cited nor the text of the Holder Rule support AFSA's contention that the Holder Rule does not allow the issuance of an injunction. The final sentence of the Holder Rule Notice does not restrict the types of remedies available when a claim or defense is preserved; it simply states that the money that a consumer may obtain from a holder based on the Notice may not exceed amounts paid. The Commission affirms that the plain language of the Rule does not limit the types of relief a court may award against a holder.

<sup>33</sup> See CU Direct.

<sup>34</sup> See, e.g. DC AG, Joint Attorneys General.

The comments do not provide evidence that such violations are widespread.<sup>35</sup> Moreover, where such violations occur, a consumer may be able assert claims and defenses against a holder. Several state laws build upon the Holder Rule by providing that, if an instrument is used to finance consumer transactions subject to the Holder Rule, a holder's rights against a consumer are subject to the limitations imposed by the Holder Rule Notice – just as if the Notice was included in the instrument.<sup>36</sup> The comments do not provide evidence that there are a significant number of transactions in which sellers violate the Holder Rule and, despite laws limiting holders' remedies, the sellers' violations allow a holder to cut off consumer claims and defenses. Therefore, the Commission declines to propose modifying the Rule to address these concerns.

#### 5. Comments Regarding Waiver of Right to Assert Claims

Two comments urged that the FTC state that consumers' rights under the Rule cannot be waived.<sup>37</sup> These commenters, however, did not describe specific "waiver"-

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<sup>35</sup> To the contrary, commenter NADA cited an FTC press release that stated an FTC investigation into 50 automobile dealers "found broad compliance with the Rule among auto dealers." NADA (citing FTC, Press Release, *FTC Finds Broad Compliance Among Auto Dealers with Rule That Protects Consumers with Car Loans* (May 16, 2011), available at <https://www.ftc.gov/news-events/press-releases/2011/05/ftc-finds-broad-compliance-among-auto-dealers-rule-protects>).

<sup>36</sup> See, e.g., Tex. Bus. & Com. Code section 3.305(e) (in a consumer transaction, an instrument that omits statement required by law preserving claims and defenses has the same effect as if the statement was included, based on Uniform Commercial Code, rev. art. 3, section 3-305(e) (2002), adopted by seven states); Uniform Commercial Code section 9-403(d) (1999) (same for record of debt in a consumer transaction that is a secured transaction); *Assocs. Home Equity Servs., Inc. v. Troup*, 343 N.J. Super. 254, 276, 778 A.2d 529, 542 (App. Div. 2001) (implying Holder Rule Notice in contract from which it was omitted). A few states also have consumer protection statutes that provide remedies against creditors that are similar or the same as those contemplated by the Holder Rule, and are not dependent on the presence of the Holder Rule Notice in the loan document. See Iowa Code § 537.3405 (preserving claims and defenses in specified transactions as a matter of law); Md. Code, Com. Law section 12-309 (same); Mass. Gen. Laws ch. 255D, section 25A (same); N.Y. Gen. Bus. Law section 253 (same); Kan. Stat. sections 16a-3-404, 16a-3-405 (same, based on Uniform Consumer Credit Code, 1974).

<sup>37</sup> DC AG ("I also recommend that the Holder Rule Notice state that a consumer's right to assert claims is unconditional and cannot be waived, so that consumers will be less subject to deceptive statements that state otherwise."); Joint Attorneys General ("The FTC should also clarify that the holder rule cannot be waived.")

related practices that they believed were not adequately addressed by the current Rule, or provide evidence of unfair practices involving waivers.

The Holder Rule was adopted, in part, to prevent the use of contractual waivers to cut off consumer claims and defenses.<sup>38</sup> Courts have recognized that the contractual provision required by the Rule makes unenforceable other provisions that purport to waive or otherwise undermine the consumers' ability to assert the claims or defenses.<sup>39</sup> Some states have also recognized a private right of action under state law against sellers, lenders or holders that attempt to undermine the Rule through contractual provisions or notices that might be described as a waiver.<sup>40</sup> Moreover, the Commission, in an unlitigated settlement of an enforcement action, indicated that it is an unfair or deceptive practice under federal law for a creditor to represent that consumers waive their rights under the Holder Rule if they do not give the creditor written notice of their complaints about sellers.<sup>41</sup>

Thus, practices that purport to waive a consumer's rights under the Holder Rule are contrary to its purpose, and companies that engage in such practices risk liability

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<sup>38</sup> 40 FR at 53508, 53510, 53512 (describing practice in which consumers rights are cut off by inserting a waiver of defenses clause in the consumer's sales agreement with the seller); *see also id.* at 53523 ("[T]he use of promissory notes, waivers of defenses, and vendor-related loan financing to foreclose consumer claims and defenses in credit sale transactions constitutes an unfair practice under 15 U.S.C. 45, as amended.")

<sup>39</sup> *Hinojosa v. Castellow Chevrolet Oldsmobile*, 678 S.W.2d 707, 709-10 (Tex. Ct. App. Corpus Christi 1984); *Hernandez v. Forbes Chevrolet Co.*, 680 S.W.2d 75, 76-77 (Tex. Ct. App. 13th Dist.1984); *but see Blackmon v. Hindrew*, 824 S.W.2d 85, 88 (Mo. Ct. App. 1992) (reaching contrary result by giving effect to contract recitals inconsistent with the Holder Notice).

<sup>40</sup> *Heastie v. Community Bank*, 727 F. Supp. 1133 (N.D. Ill.1989); *Jaramillo v. Gonzales*, 50 P.3d 554, 561-62 (N.M. Ct. App. 2002) (bank's alleged refusal to acknowledge its liability under the FTC Holder Rule stated a claim for violation of the state's Unfair Practices Act).

<sup>41</sup> *Beneficial Corporation*, 96 F.T.C. 120 (1980) (alleging that Beneficial's notices to consumers stating that the consumers' ability to assert claims or notices would be waived unless the consumer provided written notification within a certain period "has the tendency and capacity to deter consumers from asserting valid claims and defenses" and violates Section 5 of the FTC Act).

under federal and state laws. Because the current record does not provide examples of misconduct associated with waivers that is occurring despite the existing law, the Commission is not convinced that these comments warrant considering changes to the Rule. However, the Commission staff will continue to monitor this issue.<sup>42</sup>

6. Comments Regarding Modifying the Rule to Apply More Broadly to Lenders

Two comments recommended that the Commission expand the Rule to cover lenders, in addition to retail “sellers.”<sup>43</sup> Specifically, these comments urged the Commission to require lenders to include Holder Rule language in their contracts because they assert that most credit contracts are drafted by the assignee, rather than the seller, and both the seller and the lender should have joint responsibility to include the Holder Rule Notice.<sup>44</sup> However, industry commenters explained that expanding the requirements to lenders under the Rule would have meaningful costs to lenders that would ultimately be passed on to consumers.<sup>45</sup> Upon review of the comments, the Commission concludes that the record does not include sufficient evidence to support proposing an expansion of the Rule to apply to lenders.<sup>46</sup>

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<sup>42</sup> Two commenters urged the Commission to list specific practices related to the operation of the Holder Rule that are unfair or deceptive under Section 5 of the FTC Act. NCLC; NACA. The Commission declines to enumerate such a list, which is beyond the scope of this regulatory review, but will continue to use its enforcement authority to combat unfair and deceptive practices.

<sup>43</sup> See, e.g., MFY, NCLC.

<sup>44</sup> See NCLC.

<sup>45</sup> See AFSA, MBA.

<sup>46</sup> The Commission previously considered amending the Rule to extend it to third-party creditors, but ultimately declined to do so because the evidence was “inadequate to support” such an amendment. Regulatory Flexibility Act Review of the Trade Regulation Rule Concerning Preservation of Consumers’ Claims and Defenses, 53 FR 44456, 44457 (Nov. 3, 1988). In particular, the Commission found that “the record contains little evidence of consumer injury occurring after the Holder Rule became effective and little evidence to suggest that creditor participation in cutting off consumers’ claims is prevalent.” *Id.*

## Conclusion

The comments uniformly favored retention of the Rule and stated that there is a continuing need for the Rule; that the Rule benefits consumers; that the Rule does not impose substantial economic burdens; and that the benefits outweigh the minimal costs the Rule imposes. Although commenters recommended that the Commission modify certain aspects of the Rule, none of the comments provided sufficient evidence demonstrating that such modifications were necessary and would, in fact, help consumers. Moreover, none of the comments proposing such modifications analyzed the associated costs.

The FTC plans to review and consider revising our consumer education materials to address the concerns raised in the comments submitted pursuant to this rule review to ensure that consumers more easily understand the Rule's protections. Furthermore, as noted in both NCLC's and NACA's comments, the Commission has a variety of enforcement tools available to help ensure compliance.<sup>47</sup> If, at a later date, the Commission concludes that the Rule, case law interpreting the Rule, and the FTC's other enforcement tools do not provide adequate guidance and protection for consumers in the marketplace, it can then consider, based on a further record, whether and how to amend the Rule. Accordingly, the Commission has determined to retain the current Rule and is terminating this review.

By direction of the Commission.

Julie A. Mack,  
Acting Secretary.

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<sup>47</sup> The Commission encourages all stakeholders and consumers to refer suspected violations of the Holder Rule to the Commission via [ftc.gov/complaints](https://www.ftc.gov/complaints).



LIST OF COMMENTING ORGANIZATIONS AND SHORT-NAMES/ACRONYMS

Short-name/ Acronyms	Commenter
AFSA	American Financial Services Association
CU Direct	CU Direct Corporation
CUNA	Credit Union National Association
DC AG	Attorney General for the District of Columbia
Heartland	Heartland Credit Union Association
ICUL	Illinois Credit Union League
Iowa AG	Iowa Attorney General's Office
Joint Attorney Generals	Attorneys General of New York, Idaho, Iowa, Kentucky, Louisiana, Maine, Maryland, Minnesota, Virginia and Washington
MBA	Mortgage Bankers Association
MFY	MFY Legal Services, Inc., Lincoln Square Legal Services, Inc., and Fordham Law School's Feerick Center for Social Justice
NACA	National Association of Consumer Advocates,
NADA	National Automobile Dealers Association
NCLC	National Consumer Law Center, Americans for Financial Reform, The Center for Responsible Lending, Consumer Action, Consumer Federation of America, Consumers for Auto Reliability and Safety, Consumers Union, NAACP, NACA, The Institute for College Access & Success, U.S. Public Interest Research Group, Alabama Appleseed, Arizona Community Action Association, Arkansans Against Abusive Payday Lending, Arkansas Community Organizations, Community Legal Services, Connecticut Association for Human Services, Connecticut Citizens Action Group, Housing and Economic Rights Advocates, Kentucky Equal Justice Center, LAF, The Legal Assistance Resource Center of Connecticut, North Carolina Justice Center, Public Justice Center, Public Law Center, Veterans Education Success, Virginia Citizens Consumer Council, and Woodstock Institute
NIADA	National Independent Automobile Dealers Association
Wells Fargo	Wells Fargo Bank

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